BEFORE THE BOARD OF PARDONS AND PAROLE
OF THE STATE OF MONTANA

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| In the matter of the adoption of New Rule I pertaining to parole guidelines and the amendment of ARM 20.25.704 pertaining to conditional discharge from supervision | ) ) ) ) ) | NOTICE OF ADOPTION AND AMENDMENT |

TO: All Concerned Persons

1. On August 28, 2020, the Board of Pardons and Parole (board) published MAR Notice No. 20-25-70 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1556 of the 2020 Montana Administrative Register, Issue Number 16. On September 11, 2020, the board published an amended notice pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1693 of the 2020 Montana Administrative Register, Issue Number 17

2. The board has adopted New Rule I (20.25.507) as proposed.

3. The board has amended ARM 20.25.704 as proposed.

4. The board has thoroughly considered the comments and testimony received. A summary of the comments and the board's responses are as follows:

COMMENT #1: A commenter stated that the Zoom webinar hearing was deliberately confusing making it difficult to comment. The commenter also stated that for some, the parole guidelines set standards that are almost unattainable and set the offender up for failure. The example given was when an offender is granted parole upon completion of a reentry program but no program accepts the offender and so he remains in prison. The commenter also posed general questions and expressed general concerns on various other issues unrelated to the rule proposal notice.

RESPONSE #1: The commenter had a full opportunity to present comments during the hearing. Following the hearing but before expiration of the comment period, the commenter also submitted comments in writing. Respectfully, the board does not agree that the parole guidelines set unattainable standards. In the circumstance described, an offender could, for example, request a reappearance under ARM 20.25.402 to present an alternative parole plan for the board's consideration or to request that the board amend the hearing disposition based on the circumstance described. The board endeavors when necessary and appropriate, to administratively eliminate parole barriers in a manner that both protects the public and positions the offender for successful parole.

The board is unable to respond herein to the commenter's other general comments and concerns that were unrelated to the rule proposal notice and outside the scope of the rule hearing. The commenter is encouraged to submit comments specifically related to the content of any rule proposal notice published by the board.

COMMENT #2: The commenter provided oral and written comments wherein he objected to the board "flopping" an offender due to prison rule infractions (institutional misconduct) even when the offender has completed the sentencing court's recommended conditions for parole. The commenter concluded that such action renders the courts' orders subject to change by the department.

The commenter also commented on various other matters unrelated to the rule proposal notice.

RESPONSE #2: The legislature directed that the board consider four factors, in decreasing order of importance, when making parole decisions. (46-23-218(3)(a), MCA). The four statutory factors are designated (2)(a) through (2)(d) in the proposed rule. Section (2)(c) is the "institutional behavior" factor and it is ranked third in importance. The board cannot adopt a rule that conflicts with statute by, for example, disregarding institutional misconduct. The "order of importance" of the four statutory factors is carried over into the point system established by the board in the proposed parole guidelines of NEW RULE I. Institutional misconduct of a serious nature committed within 6 months of an offender's parole hearing, as described in (2)(c) of NEW RULE I, is one indicator of a lack of readiness on the offender's part to succeed in the community on parole. (46-23-208(4)(c), (e),and (n), MCA). Parole is a privilege and not a right. It must be earned. A prison disciplinary appeal process is available to offenders who maintain that they did not commit a rule infraction for which they were found guilty in an institutional disciplinary proceeding.

The board is unable to respond herein to the matters contained in the comment which are unrelated to the rule proposal notice. The commenter is encouraged to submit comments relating to the specific content of any rule proposal notice published by the board.

COMMENT #3: The commenter submitted oral comments during the rule hearing and written comments after the hearing but before expiration of the comment period. The comments were as follows:

(a) The MORRA and WRNA risk and needs assessment instruments are not validated for Montana. A Council of State Governments (CSG) report was submitted by the commenter in support of the statement. The report recommended that validation not occur until the accuracy of the assessment instruments are confirmed through quality assurance and continuous quality improvement programs with racial and gender breakdowns. The commenter stated that the below-specified cultural biases perceived to be inherent in the MORRA and WRNA assessment instruments operate against Native American offenders in the board's parole decision making. The commenter requested that the board remove risk assessment from the parole guidelines rule and from consideration by the board in making parole decisions. The commenter also addressed an issue pertaining to rates of revocation of parole and

reincarceration. Additional comments pertained to matters unrelated to the rule proposal notice.

(b) The commenter identified unemployment data gathered in the administration of the instruments as a source of cultural bias against Native Americans that formulaically result in minorities' scores on the assessment being elevated. The commenter provided documentation that the unemployment rate on rural Indian reservations is significantly higher than the unemployment rate in majority white communities not on the reservations.

(c) The commenter also cited data pertaining to past incidences of domestic violence in households where offenders lived as another source of cultural bias that is embedded in the assessment instruments and negatively impacts Native American offenders' opportunity to be paroled. Such incidences are matters over which the offenders may not have had any control. For that reason, the commenter stated, such data pertaining to household domestic violence should not operate to disadvantage offenders again, later in life, in a parole decision making process.

(d) Educational experiences were also cited by the commenter as a source of bias against Native American offenders embedded in the risk assessment instruments used by the board. The commenter referred to a 2019 study by the ACLU entitled "Empty Desks" pertaining to indigenous students being disproportionately pushed out of the classroom and into the criminal justice system for adolescent behaviors that are not criminal in nature. The commenter concluded that the risk assessment inquiries into previous expulsions or suspensions from school, coupled with other life experiences referred to herein, negatively impact Native American offenders and elevates their MORRA and WRNA scores.

(e) The commenter objects to the board's consideration of the fourth statutory factor, i.e., risk reduction programming and treatment completion, in making paroling decisions. The commenter noted that an offender on a waiting list for programming can be bumped down the list by the department so that an offender nearer to their discharge date can receive the programming before release. Notwithstanding that the offender has no control over the wait list, two points are assigned by the board under its parole guidelines point system if an offender is on a "wait list" but has not completed the programming.

(f) Treatment interventions that focus on the crime without attempting to heal neurobiological wounds are futile. The commenter posited that the board should not use risk assessment as a tool to determine how soon an offender can be paroled and can gain access to non-punitive counseling, addiction and mental health treatment resources in the community that are not readily available through the Department of Corrections.

(g) There is no mechanism in place for an offender who is "flopped" for multiple years, to reappear before the board sooner than one year from the date of the board action. The commenter stated that an attorney for the legislative services division alerted the board or department of that problem.

(h) The commenter alleged abuse of power by prison staff, retaliatory discipline, denials of medication support to offenders under stress and in need of coping mechanisms, all amounting to an attempt to punish mental health into submission without providing anger management resources.

RESPONSE #3:

(a) The risk and needs assessment tools have long been in use around the country and were developed and validated by the University of Cincinnati. The lengthy process of "norming" the validated instruments for Montana is not complete. The board is an end-user of the risk and needs assessments administered by trained department personnel. As such, the board has no role in the validation process or the norming of the instruments.

The board is required by statute to use risk and needs assessments in making parole decisions. (46-23-218(3)(a)(i), MCA). The board cannot adopt an administrative rule that conflicts with statute by, for example, omitting the risk and needs assessments from consideration in making parole decisions. Removal of that factor from among those that the board must consider would require a legislative amendment.

The board is unable to respond herein to the matters contained in the comment which are unrelated to the rule proposal notice. The commenter is encouraged to submit comments relating to the specific content of any rule proposal notice published by the board.

(b) Any alleged cultural bias against American Indian offenders that is allegedly inherent in risk and needs assessment tools is neutralized or countered by the requirements in 2-15-2305(3)(a), MCA; 46-23-218(1) and (2), MCA; and ARM 20.25.102(1) and (2).

Employment history and stability of an offender's past employment experience are required to be considered by the board in making paroling decisions under 46-23-208(4)(j), MCA. Removal of that consideration would require a legislative amendment to the statute. The board is generally able to address historical employment instability administratively by requiring certain education services be secured as a parole supervision condition, e.g., a requirement that the offender obtain a vocational rehabilitation evaluation and/or undergo job training or counseling while under supervision.

(c) Any alleged cultural bias against American Indian offenders allegedly inherent in risk and needs assessment tools is neutralized or countered by the requirements in 2-15-2305(3)(a), MCA; 46-23-218(1) and (2), MCA; and ARM 20.25.102(1) and (2).

Household domestic violence is not unique to American Indian households. Board members must receive training in American Indian culture *and problems* under 46-23-218(1) and (2), MCA and ARM 20.25.102. The training mitigates any alleged bias borne of a lack of awareness of household domestic violence in American Indian households.

(d) Any alleged cultural bias against American Indian offenders allegedly inherent in risk and needs assessment tools is neutralized or countered by the requirements in 2-15-2305(3)(a), MCA; 46-23-218(1) and (2), MCA; and ARM 20.25.102(1) and (2).

Education is required to be considered by the board in making parole decisions under 46-23-208(4)(h), MCA, and in considering parole release conditions under 46-23-218(3)(c), MCA. Education is one of the domains evaluated in a risk and needs assessment as stated in (5) of NEW RULE I. Removal of education as a factor to be considered by the board would require legislative amendments. The

board is generally able to address education deficits administratively by setting parole supervision conditions related to education in appropriate circumstances.

(e) Wait lists for offenders in need of treatment do exist in the dynamic environment of offender programming. It is not uncommon for a person on a wait list to be bumped further down the list by the department to accommodate the treatment needs of another offender who is nearer to their discharge or release date. The board is required under 46-23-218(3)(a)(iii), MCA, to consider an offender's participation in risk reduction programs and treatment completion. That factor is therefore included as (2)(b) in the parole guidelines rule. The point system established in NEW RULE I is consistent with the "decreasing order of importance" measure in 46-23-218(3), MCA. If an offender has been unable to complete treatment for *any* reason, the risk still exists. The board must take that risk to the public into account when making parole decisions. When appropriate in light of all of the circumstances, the board may be able to administratively address the issue of backlogs and waiting lists by ordering completion of treatment as a condition of parole supervision upon being paroled into the community.

(f) Respectfully, the board disagrees that "non-punitive" counseling, addiction, and mental health treatment resources are not readily available to offenders in prison. All of those resources are readily available. Provision of mental health and addiction related services in a prison setting does not make them "punitive" services.

The board is required by statute to use risk and needs assessments in making parole decisions. (46-23-218(3)(a)(i), MCA). The board cannot adopt an administrative rule that conflicts with statute by, for example, omitting the risk and needs assessments from consideration so that offenders could parole to the community to secure "non-punitive" treatment services.

(g) The board did not receive a comment from an attorney for legislative services division concerning MAR Notice No. 20-25-70 pertaining to NEW RULE I (parole guidelines) or pertaining to ARM 20.25.704 (Conditional Discharge From Supervision). Reappearances before the board sooner than one year after an offender is "flopped" for multiple years is unrelated to MAR Notice No. 20-25-70. Accordingly, the board is unable to respond to the comment herein. The commenter is encouraged to submit comments that are specifically related to any rule proposal notice that the board publishes.

In due course, the board intends to publish notice of proposed amendments to ARM 20.25.402 which rule pertains, in part, to timing of reappearances before the board after being denied parole. When that occurs, the commenter is encouraged to submit comments. In any event, the timing of reappearances is already set by statute (46-23-201(5), MCA) and the board complies with that statute. Rules may not unnecessarily repeat statutory language. (2-4-305(2), MCA)

(h) Respectfully, the board is not involved in and has no control over prison operations. If abuses of power by prison staff, retaliatory discipline, denials of medication support are alleged to have occurred, there are internal institutional procedures and remedies afforded to the offenders. The internal institutional procedures and remedies include grievance procedures, emergency grievance procedures, grievance appeals, disciplinary hearings, and disciplinary appeals. In

addition, offenders have a right of access to the courts for the redress of cognizable legal claims.

COMMENT #4: The commenter referred to the notice of public hearing on the parole guidelines rule, but otherwise the comment was unrelated to the specific content of the rule proposal notice. The commenter stated that he was denied parole in 2020 and that the board was to have begun using the MORRA point system in 2017. The remainder of the commenter's submission pertained to numerous other grievances and legal claims related to the commenter's individual legal circumstances.

RESPONSE #4: As stated in the REASON for the parole guidelines as set out in the rule proposal notice, the statutory factors that the board must consider in making paroling decisions and the framework for the point system and scoring model for weighting those factors in "decreasing order of importance" have been in use by the board since August 2017. The rest of the commenter's comments were unrelated to the rule proposal notice and outside the scope of the rule hearing. Accordingly, the board is unable to respond herein to those comments. The commenter is encouraged to submit comments that are specifically related to the content of any rule proposal notice that is published by the board.

PROPOSED AMENDMENT OF ARM 20.25.704, Conditional Discharge From Supervision.

COMMENT #5: Although no public comments were received pertaining to the proposed amendment of ARM 20.25.704 Conditional Discharge From Supervision, one comment was submitted alleging that the board violated the rule in the commenter's particular circumstances.

RESPONSE #5: Inasmuch as the comment is unrelated to the proposed amendments of ARM 20.25.704 and is outside the scope of the hearing, the board is not able to respond to the comment. The commenter is encouraged to submit comments pertaining to the specific content of any rule proposal notice published by the board.

/s/ Colleen E. Ambrose
Colleen E. Ambrose
Rule Reviewer

/s/ Annette Carter
Annette Carter
Chair
Board of Pardons and Parole

Certified to the Secretary of State December 15, 2020.